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Evergreen Shipping Agency (Am.) Corp. v. Federal Maritime Commission: Considering the Creation of a Brave New *Loper-Bright* World for the Shipping Industry

I. INTRODUCTION

When a so-called agency guideline turns into a bright-line rule or single-factor test, industry players are left with agency decision-making that is hard to follow and unpredictable. Evergreen Shipping Agency (America) Corp. and its affiliates (Evergreen), an ocean carrier, and TCW, Inc. (TCW), a trucking company, are two such shipping industry players that have suffered the consequences of less-than-clear agency reasoning by the Federal Maritime Commission (FMC or Commission). Evergreen refused to waive detention charges for TCW's failure to return Evergreen's container and vehicle chassis to port on time, due to a "COVID-related closure"[1] of a warehouse.[2] TCW paid the detention charges but later filed a small claims complaint with the FMC on the basis of the reasonableness of Evergreen's charges, citing agency guidelines on reasonableness to back its claim.[3]

"The small claims officer issued an initial decision in favor of TCW. The Commission then *sua sponte* gave notice that it intended to review that decision."[4] The Commission affirmed the officer's initial decision, applying its guidelines on the reasonableness of detention charges,

1. *See infra* text accompanying note 70.
2. Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm'n, 106 F.4th 1113, 1116, 2024 AMC 347 (D.C. Cir. 2024).
3. *Id.*
4. *Id.* (emphasis added).

specifically its "incentive principle."[5] Evergreen petitioned for judicial review of the FMC order.[6] The United States Court of Appeals for the District of Columbia Circuit *held* that the FMC order was "arbitrary and capricious" for its dismissal of potentially relevant facts to the case and illogical application of the incentive principle. *Evergreen Shipping Agency (Am.) Corp. v. Federal Maritime Commission*, 106 F.4th 1113, 2024 AMC 347 (D.C. Cir. 2024).

II. BACKGROUND

According to the Administrative Procedure Act, "'adjudication' means agency process for the formulation of an order."[7] "The FMC *adjudicates* complaints alleging violations of the laws it administers," including the Shipping Act,[8] as amended by the Ocean Shipping Reform Act of 2022 (the Shipping Act).[9] According to § 41301 of the Shipping Act, "a person may file with the [FMC] a sworn complaint alleging a violation [of the Act]," and that person "may seek reparations for an injury . . . caused by the violation."[10] The language in section 41301 applies to complaints both for "formal adjudication," including that of small claims and charge complaints recommended to the Commission by the Office of Enforcement at the Bureau of Enforcement, Investigations, and Compliance at the FMC,[11] and the "informal adjudication of small claims."[12]

Small claims are "claims of $50,000 or less" alleging "a violation occurring in connection with the foreign commerce of the" United States.[13] While small claims alleging Shipping Act violations are generally adjudicated informally under subpart S of the Commission's rules, "the respondent [may] elect[] not to consent to determination of the claim under subpart S," in which case subpart T, or the formal

5. *Id.*
6. *Id.* at 1113.
7. 5 U.S.C. § 551.
8. *Complaints and Assistance*, FED. MAR. COMM'N (emphasis added), https://www.fmc.gov/complaints-and-assistance/ (on file with the Tulane Maritime Law Journal) (last visited Mar. 7, 2026).
9. Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272-86 (codified as amended in scattered sections of 46 U.S.C.).
10. 46 U.S.C. § 41301; *see* 46 C.F.R. § 502.61 (2024).
11. *Guidance on Charge Complaint Interim Procedure*, FED. MAR. COMM'N, https://www.fmc.gov/ocean-shipping-reform-act-of-2022-implementation/guidance-on-charge-complaint-interim-procedure/ (last visited Mar. 7, 2026).
12. § 41301; *see* §§ 502.301-05; *see also* §§ 502.311-21.
13. § 502.301.

adjudication process, applies.[14] If adjudicated informally under subpart S, a small claims officer (SCO) appointed by the FMC's chief administrative law judge oversees the matter.[15] The SCO issues an initial decision that is final unless the "Commission exercises its discretionary right to review the decision."[16] A court of appeals has jurisdiction over the Commission's final order.[17]

In 2022, Congress also added "charge complaints" to the Shipping Act.[18] Charge complaints largely address disputes of detention and demurrage charges.[19] For this adjudicatory measure, housed under section 41310 of the Shipping Act, the FMC created the "charge complaint interim procedure,"[20] as there is no procedure under agency rules for "charge complaints," specifically.[21] Using the interim procedure, parties now have the ability to file such charge complaints with the FMC for noncompliance with sections 41104(a) or 41102 of the Shipping Act,[22] notably, section 41102(c) of the Shipping Act. Previously, a claim about charges assessed by a common carrier in violation of section 41102(c) could have been brought as a formal or informal complaint, in the form of a small claim, if it was at or below the threshold of $50,000, or otherwise.[23] "A new permanent procedure [for charge complaints will] be completed through a formal rulemaking [process] after notice and public

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14. §§ 502.311-21. If formal procedure under "subpart T" applies, an administrative law judge adjudicates the matter. § 502.311.

15. § 502.301.

16. § 502.304(g). The FMC has thirty days, from the date of the decision's service, to exercise the right. *Id.*

17. 5 U.S.C. § 704 (giving the court of appeals jurisdiction under 28 U.S.C. § 2342(3)(B)); 28 U.S.C. § 2342(3)(B) ("the court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all rules, regulations, or final orders of the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 41 or 411 of title 46").

18. *Guidance on Charge Complaint Interim Procedure*, *supra* note 11; *see* Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272-86 (codified as amended in scattered sections of 46 U.S.C.).

19. Ocean Shipping Reform Act of 2022, 46 U.S.C § 41310; *Guidance on Charge Complaint Interim Procedure*, *supra* note 11.

20. *Guidance on Charge Complaint Interim Procedure*, *supra* note 11; *see Industry Advisory—Interim Procedures for Submitting "Charge Complaints" Under 46 U.S.C. § 41310*, FED. MAR. COMM'N (July 14, 2022), https://www.fmc.gov/articles/industry-advisory-interim-procedures-for-submitting-charge-complaints-under-46-u-s-c-§-41310/ (on file with the Tulane Maritime Law Journal).

21. 46 C.F.R. §§ 502.1-.991 (2024).

22. *Guidance on Charge Complaint Interim Procedure*, *supra* note 11; *see* Ocean Shipping Reform Act of 2022, 46 U.S.C. § 41310.

23. *See Ocean Shipping Reform Act of 2022 Implementation: FAQs*, FED. MAR. COMM'N, https://www.fmc.gov/ocean-shipping-reform-act-of-2022-implementation/ (on file with the Tulane Maritime Law Journal) (last visited Mar. 7, 2026).

comment," following "experience gained" by the Commission from those charge complaints filed during the interim period.[24]

Section 41102(c) requires common carriers, marine terminal operators, and ocean transportation intermediaries "to establish, observe, and enforce *just and reasonable* regulations and practices relating to or connecting with the receiving, handling, storing, or delivering [of] property."[25] To clarify the "just and reasonableness" language in section 41102(c), as well as section 545.4(d) of agency rules,[26] the FMC issued a Notice of Proposed Rulemaking (NPRM) in 2019.[27] While section 41102(c) is broad, the NPRM exclusively focused on the reasonableness standard as it relates to detention and demurrage charges.[28] In 2020, following the Commission's issuance of the NPRM, the Commission issued formal guidance in the form of the Final Interpretive Rule on Demurrage and Detention Under the Shipping Act (Interpretive Rule), which was codified in section 545.5 of the Code of Federal Regulations.[29] Section 545.5 is a means of interpreting the reasonableness standard under the Shipping Act. It allows the Commission, "in assessing the reasonableness of demurrage and detention practices and regulations," to "consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity,"[30] also known as the "incentive principle."[31] However, section 545.5 includes other understandings of reasonableness.

Section 545.5 is a "non-exhaustive list of factors that the Commission *may* consider when assessing the reasonableness of

24. *Guidance on Charge Complaint Interim Procedure: Why Are Interim Procedures Necessary?*, FED. MAR. COMM'N, https://www.fmc.gov/ocean-shipping-reform-act-of-2022-implementation/guidance-on-charge-complaint-interim-procedure/ (on file with the Tulane Maritime Law Journal) (last visited Mar. 7, 2026).

25. 46 U.S.C. § 41102(c) (emphasis added).

26. Section 545.4 breaks down section 41102(c) in the form of elements "to establish a successful claim for reparations," one of which is that "the practice or regulation [be] *unjust or unreasonable*." 46 C.F.R. § 545.4(d) (2024) (interpreting § 41102(c)) (emphasis added).

27. Notice of Proposed Rule Making for the Interpretive Rule on Demurrage and Detention Under the Shipping Act. 84 Fed. Reg. 48850 (Sep. 17, 2019).

28. *Id.*; 46 C.F.R. § 545.5 (2024) ("the purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.").

29. *See* Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 (May 18, 2020).

30. § 545.5(c)(1).

31. *See id.*

demurrage and detention practices."[32] The non-exhaustive nature of the list was intended by the rulemaking process,[33] and this intent is reflected in section 545.5(f).[34] Therefore, "each section 41102(c) case [should still] be decided on its particular facts, and the rule [does] not foreclose . . . the Commission from considering [other factors]."[35]

In clarifying that the set of factors was issued as guidance, the Interpretive Rule makes clear that section 545.5 "does not constitute a *legislative rule*."[36] Moreover, the Interpretive Rule explicitly states that the "basis for any legal action would be section 41102(c),"[37] not the incentive principle, or section 545.5. Turning to the U.S. Code for guidance, Section 553 of Title 5 explains that interpretive rules, even *final* interpretive rules, are guidance and that the subsection on rulemaking—and, therefore, the APA's rulemaking process—does not apply to interpretive rules.[38] In the Interpretive Rule, the Commission explained that the "key consideration" to determine whether a rule is subject to the APA is "whether the rule has 'legal effect,' which courts assess by asking" a series of questions posed in *American Mining Congress v. Mine Safety & Health Administration*.[39] The *American Mining Congress* court asked,

> (1) [w]hether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly involved the general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.[40]

32. Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29639 (emphasis added).

33. *Id.*

34. § 545.5(f) ("nothing in [the] rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in [the] rule.").

35. Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29639.

36. *Id.* at 29641-42 (emphasis added); *see* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).

37. Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29641.

38. 5 U.S.C. § 553(b); Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29641.

39. Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29641-42.

40. *Id.*

In response to stakeholders like the World Shipping Council (WSC), who opposed the authority of the Commission to issue the Interpretive Rule on the basis of the FMC's meeting the first prong of *American Mining Congress* test,[41] the FMC explained that it was not issuing a new rule or "any new legal authority" by issuing the *Interpretive* Rule and that "the basis for any legal action would [still] be section 41102(c)."[42] Regarding the second prong, which would seem dispositive of whether the Interpretive Rule was in fact *interpretive*, the FMC explained that courts look to agencies' intent.[43] To this end, the FMC argued intent based on the fact that it published section 545.5 under the customary section for interpretive rules, "Interpretations and Statements of Policy."[44] The Commission also explained that the last two prongs of the test were not met: The Commission never involved its general legislative authority to issue the rule and the rule did not amend a legislative rule.[45] Thus, the agency argued that the test was not met and the Interpretive Rule was not subject to the APA in the way critics thought it was.[46]

The Interpretive Rule aside, when the FMC adjudicates claims, including 41102(c) claims, has a duty to abide by the APA. Under the APA, any "agency action, findings, and conclusions [by the FMC] found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" may be held unlawful and set aside by the reviewing court.[47] In the case of the Commission, a court of appeals must review any final order from the agency.[48] However, the bottom line of the "arbitrary and capricious" standard, outlined in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, is that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[49]

41. *Id.*
42. *Id.* at 29642.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. 5 U.S.C. § 706(2)(A).
48. *See supra* text accompanying note 17.
49. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

III. COURT'S DECISION

In the noted case, the D.C. Circuit leaned on Commissioner Bentzel's dissent in the Commission's final order.[50] The court also compared FMC guidelines in the form of the Interpretive Rule,[51] as well as the goals of the rulemaking process and section 545.5,[52] to the agency's reasoning in the final order.[53] Moreover, the court relied on *State Farm* to "ensur[e] the agency . . . engaged in reasoned decisionmaking [sic] within [the] boundaries [of the APA]"[54] and did not act in a way that was "arbitrary and capricious"[55] in its application of the reasonableness standard[56] of the Shipping Act to disputed detention and demurrage charges. The D.C. Circuit held that the Commission's Order Affirming the Initial Decision by the SCO in favor of TCW, which determined that the detention charges by Evergreen were unreasonable,[57] was "arbitrary and capricious" because the Commission did not consider relevant facts and illogically applied the "incentive principle," ultimately failing to respond in any reasonable way to Evergreen. [58] The crux of the issue here is the application of the "incentive principle."[59]

First, setting the backdrop of the holding, the D.C. Circuit made clear that just as the reasonableness standard in section 41102(c) is the "underpinning of the Shipping Act,"[60] so, too, is the Commission's authority, which is vested in it by the Shipping Act, to determine whether a detention charge is "just and reasonable."[61] Second, the court introduced the Interpretive Rule as a means of "clarify[ing] what constitutes 'just and reasonable rules and practices' with respect to the assessment of demurrage, detention, and per diem charges . . . when ports are congested

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50. TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp., No. 1966(I), 2022 WL 18068977, at *10-12 (Dec. 29, 2022) (Commissioner Bentzel, dissenting).

51. *See* Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 (May 18, 2020).

52. *See* Notice of Proposed Rule Making for the Interpretive Rule on Demurrage and Detention Under the Shipping Act. 84 Fed. Reg. 48850 (Sep. 17, 2019); *see also* 46 C.F.R. § 545.5 (2024).

53. *See TCW*, 2022 WL 18068977.

54. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024); *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

55. 5 U.S.C. § 706(2)(A).

56. *See* 46 U.S.C. § 41102(c).

57. Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm'n, 106 F.4th 1113, 1115-17, 2024 AMC 347 (D.C. Cir. 2024).

58. *Id.* at 1114, 1117.

59. *Id.* at 1114.

60. *Id.* at 1117.

61. *Id.* at 1115; *see* 46 U.S.C. § 41102(c); *see also* 46 C.F.R. § 545.5 (2024).

or otherwise inaccessible."[62] Third, the court described the FMC's "incentive principle," or "promot[ing] freight fluidity," as an "aspect" of the Interpretive Rule.[63] Contextualizing the incentive principle, the court explained that the FMC did not intend section 545.5 to constitute a "bright line rule."[64] In so clarifying, the court segued into an issue central to the noted case as well as to the industry: the incentive principle[65] and the FMC's application of it. The incentive principle bleeds into both prongs of the appellate court's holding: the lack of a nexus between facts and reasoning and the illogical application of the incentive principle.[66]

Following Court precedent in *State Farm*, the D.C. Circuit in *Evergreen* split its analysis into the following parameters: (1) an agency must "articulate 'a satisfactory explanation for its action including a rational connection between the facts found and the choice made'" and (2)

> [a]n agency action is arbitrary and capricious if the agency has[] entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[67]

The D.C. Circuit faulted the Commission on all fronts, holding that the Commission (1) "failed to consider relevant factors," (2) "did not give a reasoned explanation for several aspects of its decision, and [(3)] applied the incentive principal" in an illogical manner.[68]

The court lumped the first two aspects of the holding together, beginning with its likening of the Commission's application of the incentive principle in the FMC's final order to the creation of a bright line rule.[69] The court made this analogy as the Commission did not include nor explain (1) "TCW's contractual obligation to pay detention charges after the expiration of free time," allocated to TCW by Evergreen and to which TCW did not object, or (2) why the Port of Savannah's

62. *Evergreen*, 106 F.4th at 1115 (alteration in original) (quoting Petition of the Coalition for Fair Port Practices for Rulemaking; Notice of Filing and Request for Comments, 81 Fed. Reg. 95612, 95612 (Dec. 28, 2016)).

63. *Id.* at 1115.

64. *Id.*; *see* Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29642, 29654 (May 18, 2020).

65. *Evergreen*, 106 F.4th at 1115 (quoting § 545.5(c)(1)).

66. *Id.* at 1117-18.

67. *Id.* at 1117.

68. *Id.*

69. *Id.*

announcement of its closure "before TCW took the container,"[70] among other key facts, had no bearing on the agency's reasoning.[71] Instead, the Commission dismissed the facts and equated them to issues raised and dismissed in the rulemaking process.[72] In particular, the FMC pointed to its having been clear in its rulemaking that "no amount of detention can incentivize the return of a container when the terminal cannot accept the container."[73]

However, the D.C. Circuit declined the opportunity to rely on the incentive principle in this way. Instead, the court pointed to the Interpretive Rule and Commissioner Bentzel's dissent.[74] The Interpretive Rule made it clear that the rule itself had no "'legal effect' within the meaning of the *American Mining* test" as an *interpretive* rule and that it simply served as guidance for defining "just and reasonable" charges in section 41102(c) of the Shipping Act.[75] Commissioner Bentzel warned that using the incentive principle in any way other than to offer guidance would put the Commission, "at risk of overstating the manufactured principle at the peril of usurping reasonableness," which is the "underpinning of the Shipping Act."[76] In excluding potentially relevant factors—a commitment of the Interpretive Rule[77]—the Commission construed the incentive principle to mean that "the assessment of penalties for days that a terminal is closed for business, or on holiday"[78] was *unreasonable*. Thus, the D.C. Circuit saw the Commission as substituting the incentive principle for *reasonableness*, agreeing with Commissioner Bentzel.[79]

70. The Port of Savannah's closure, about which the Port warned TCW, occurred from May 23 to 25. *Id.* at 1116-17. While there was a "COVID-related closure," noted in the D.C. Circuit's opinion, *id.* at 1116, on Saturday, May 23, 2020, the Port of Savannah was closed on May 26, 2020, because of Memorial Day. TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp., No. 1966(I), 2022 WL 18068977, at *12 (Dec. 29, 2022) (Commissioner Bentzel, dissenting). The Port of Savannah had been closed on Saturdays from mid-March 2020 to mid-June 2020. *Id.*

71. *Evergreen*, 106 F.4th at 1117; *see TCW*, 2022 WL 18068977, at *12 (Commissioner Bentzel, dissenting).

72. *Evergreen*, 106 F.4th at 1117 (quoting *TCW*, 2022 WL 18068977, at *5-6).

73. *Id.*

74. *Id.* (quoting *TCW*, 2022 WL 18068977, at *10); *see also* Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29642 (May 18, 2020).

75. Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29642.

76. *TCW*, 2022 WL 18068977, at *10 (Commissioner Bentzel, dissenting).

77. *See* Notice of Proposed Rule Making for the Interpretive Rule on Demurrage and Detention Under the Shipping Act. 84 Fed. Reg. 48850, 48851-52 (Sep. 17, 2019).

78. *TCW*, 2022 WL 18068977, at *11 (Commissioner Bentzel, dissenting).

79. Commissioner Bentzel, warning against usurping the Code, stated, "terms such as 'incentive principle' do not replace 'reasonableness,' which [underpins] the Shipping Act." *Id.* at *10.

In explaining the first two points of the holding, the court also pointed to the Commission's reasoning in the Interpretive Rule "that detention fees may be unreasonable in certain situations, including 'uncommunicated or untimely communicated notice of terminal closures,' which suggests that whether the Port of Savannah had communicated its closure to TCW [*was*] relevant to the reasonableness of the fees."[80] Thus, the D.C. Circuit held that "[i]t was arbitrary and capricious for the FMC to commit to making a circumstantial, fact-bound inquiry in the [I]interpretive [R]ule and then, when it came time to apply the rule, to jettison all but its favorite factor,"[81] without explanation other than equating the issuance of detention charges in the context of a port closure to a bright-line rule for *reasonableness*.[82]

Bright-line rule aside, the court explained that the "logical inconsistency alone [also] render[ed] the Commission's [o]rder arbitrary and capricious,"[83] in addressing the third aspect of the holding. After applying the incentive principle to the basic facts of the case, the D.C. Circuit reached a result different from that of the Commission.[84] The court explained that "being charged for detention during a port closing announced before the carrier picks up the equipment heightens the incentive to return the equipment on time,"[85] *not* the opposite. The court added that the potential for logjams in the supply chain, a concern regarding freight fluidity cited by the Commission in its brief before the D.C. Circuit, actually *points* to the detention charges' incentivizing effect in this case.[86] The court concluded that the "Commission cannot rest upon a bare assertion that a detention charge assessed for a day when a port is closed has no incentivizing effect. It must, at a minimum, provide a logical explanation for its view," holding that it was "arbitrary and capricious" to fail to do so.[87]

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80. Evergreen Shipping Agency (Am.) Corp. v. Fed. Mar. Comm'n, 106 F.4th 1113, 1118, 2024 AMC 347 (D.C. Cir. 2024) (emphasis added); Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638, 29655 (May 18, 2020).

81. *Evergreen*, 106 F.4th at 1118.

82. *Id.* at 1117.

83. *Id.* at 1118.

84. *Id.*

85. *Id.*

86. *Id.* ("If the Commission is right that there is no incentivizing effect from charging detention fees on a weekend when a port is closed, then why would there be a logjam to avoid the detention charge?"); Brief for Respondent, *Evergreen*, 106 F.4th 1113 (D.C. Cir. 2024) (No. 23-1052), 2023 WL 4289325, at *15-16).

87. *Id.*

IV. ANALYSIS

The exercise of independent judgment displayed by the D.C. Circuit in this case stands as an omen of impending adjudicatory tensions in a world of *Loper Bright Enterprises v. Raimondo*. With the fall of *Chevron, Inc. v. Natural Resources Defense Council*, overturned by *Loper Bright* in 2024,[88] *Evergreen* serves as an example of the exercise of independent judgment that Justice Roberts called for in *Loper Bright*.[89] However, the Interpretive Rule, codified in the Code of Federal Regulations in 2020, makes no mention of any *Chevron* ambiguity regarding the reasonableness standard in 41102(c).[90] Critics of the rule did claim, in the rulemaking process, that the agency did not have the "authority under the Shipping Act to issue [the rule]."[91] But the FMC underscored that the rule was *interpretive* and, thus, that the lack-of-authority argument was moot.[92] It also refuted the idea that since Congress substituted the original language of section 41102(c) for its current statutory reading, Congress "eliminated the Commission's authority to determine, prescribe and order enforcement of a just and reasonable regulation and practice."[93] The Commission explained that the Interpretive Rule "does not determine, prescribe, or order enforcement of a reasonable practice" and merely provides factors that the Commission may consider.[94] If the Interpretive Rule at issue in *Evergreen Shipping* were legislative, however, the just and reasonable standard could have been considered ambiguous under *Chevron*.[95]

In overturning *Chevron*,[96] *Loper Bright* held that the courts should decide issues of "statutory construction" since they are equipped to do so, especially when they involve an "agency's *own* power."[97] The Court in *Loper Bright* clarified, however, that the ruling simply distinguishes

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88. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395-96, 412-13 (2024) ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.").

89. *See Loper Bright*, 603 U.S 369.

90. *See* Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. 29638 (May 18, 2020); *see also id.* at 379-80 (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), on the *Chevron* inquiry for statutory ambiguity).

91. Final Interpretive Rule on Demurrage and Detention Under the Shipping Act, 85 Fed. Reg. at 29643-44.

92. *Id.*

93. *Id.*

94. *Id.* at 29644, 29644 n.89.

95. Nonetheless, one must understand that the *Evergreen* court did not abrogate the Interpretive Rule but, rather, adjudicated an agency's final order through judicial review.

96. *See supra* cited quote accompanying note 88.

97. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 373 (2024) (emphasis added).

between *Chevron*'s idea of ambiguities "*necessarily*"[98] being delegated to agencies[99] and respecting the foundation of the APA,[100] or recognizing that "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is . . . to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[101] In outlining the role of a reviewing court, *Loper Bright* referenced *State Farm*.[102] In *State Farm*, the Court explained that while "a court is not to substitute its judgment for that of the agency.. . . [T]he agency [still] must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[103] Thus laying out the "arbitrary and capricious standard" for courts when reviewing agency policy.[104]

Agency policy is to be distinguished from agency statutory interpretation, however.[105] The Court in *Loper Bright* does not clearly distinguish between the application of *Chevron* and *Skidmore v. Swift & Co.*[106] to statutory construction and "cases involving something else, such as applying statutory or regulatory language when . . . resolv[ing] a particular matter before the agency."[107] The latter is addressed by *State Farm*.

The D.C. Circuit, therefore, is correct in relying on *State Farm*. In so relying, the circuit distinguished its goal of ensuring the FMC adheres to reasoned decision-making within the boundaries of the APA from one of correcting any misplaced interpretation authority by the agency. Indeed, *Evergreen* did not review an interpretive rule, but rather, the final order of agency action.

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98. *But see* United States v. Mead Corp., 533 U.S. 218, 237 (2001) (clarifying that Skidmore v. Swift & Co., 323 U.S. 134 (1944), still applies "where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked").

99. *Loper Bright*, 603 U.S. at 404.

100. *Id.*

101. *Id.* at 395.

102. *Id.* (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).

103. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

104. *See* Jack Beermann, Loper Bright *and the Future of* Chevron *Deference*, 65 WM. & MARY L. REV. ONLINE 1, 3 (2024).

105. *Id.* at 3, 8, 17, 19-20.

106. Skidmore v. Swift & Co., 323 U.S. 134 (1944) (holding that "[t]he weight of . . . a[n] [agency] judgment . . . will depend upon [its] thoroughness . . . , the validity of its reasoning, its consistency with [precedent], and . . . factors [giving] it power to persuade") (quoting *id.* at 140).

107. Beermann, *supra* note 104, at 19.

In shutting down the Commission's application of the Interpretive Rule, the *Evergreen* court affirmed the Commission's Interpretive Rule to be *interpretive*, and not legislative or legal, in nature. What is notable, then, about *Evergreen* is that it reminds industry players of the difference between an interpretive rule—or guidance—and a legislative rule with legal effect. *Evergreen* is a timely reminder of this distinction in the wake of *Loper Bright* and its ability to put statutory interpretation of ambiguous language back in the hands of the courts: Agencies should avoid putting too much emphasis on interpretive rules in their decision-making. Such carefulness would behoove agencies so as to avoid potential legal challenges of agencies' decisions. After all, interpretive rules do not replace the underlying statutory standard.

The D.C. Circuit in *Evergreen* reminds the Commission of the court's authority to review agency action and of the guidance, as opposed to the legal interpretation, that the incentive principle, through the Interpretive Rule, is supposed to provide to the shipping industry, as well as to the courts. Suppose the Commission continues to apply the Interpretive Rule in the same way that it did in *Evergreen*, without explaining the nexus between its decision on the reasonableness of demurrage and detention charges and the facts of the particular case at hand, in accordance with *State Farm*, or similar cases in other jurisdictions. Will appellate courts continue to overturn or remand decisions by the Commission regarding section 41102(c) disputes?

V. CONCLUSION

The D.C. Circuit has correctly ruled that the incentive principle may help *guide* an understanding of reasonableness for adjudication purposes. While the Commission has the authority to interpret the Code, the *Evergreen* court was correct to hold that a general understanding of reasonableness under federal law, guided by shipping industry incentives, cannot be substituted by a bright-line rule or one-factor test. *Evergreen* should serve as a warning to the Commission to separate guidance from rules with legislative effect and to provide an adequate nexus between the facts on the record and the conclusion reached by the agency, to avoid further rulings like that of *Evergreen* by strictly adhering to the APA. If the Commission makes this distinction moving forward, it will likely come out unscathed in the present universe of legal precedent involving *Loper Bright*, including the developments in administrative law that will surely ensue as a result of this brave, new *Loper-Bright* world for federal agencies and all those who interact with them.

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